NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DR. STEPHEN EMBURY, Plaintiff - Appellee, v. DR. TALMADGE E. KING, JR., in his individual and official capacity; et al., Defendants - Appellants, and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a public corporation, Defendant.	No. 04-15515 D.C. No. CV-01-01448-CW MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted April 5, 2006
San Francisco, California

Before: SCHROEDER, Chief Judge, TROTT and KLEINFELD, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Dr. Talmadge King and other individually named defendants appeal the district court's denial of qualified immunity. Because we find that any property right that the plaintiff, Dr. Stephen Embury, might have had in his job was not clearly established, we reverse.

Dr. Embury argues that we have no jurisdiction to consider whether he has a property interest in his job for due process purposes. The district court found that there was a genuine issue of material fact and that Dr. Embury's evidence, if believed, could establish that he had a property interest in continued employment under California law. Thus, this Court would, under Knox v. Southwest Airlines,[1] lack jurisdiction to review that decision at this time.

Under the post-Knox decision in Saucier v. Katz,[2] we are nevertheless required to decide whether, under Dr. Embury's version of the facts, he had a property interest in his non-tenure position sufficient to trigger a full pre-termination hearing. He does not, for two reasons. First, he did not ask for a pre-termination hearing until just before Christmas and nine days before his position

[1] Knox v. Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir. 1997).

[2] Saucier v. Katz, 533 U.S. 194, 201 (2001).

was to terminate, when anyone would expect many of the university officials who would need to participate to be gone for the holidays. Second, all of his papers, the regulations, and several years worth of communications to and from Dr. Embury made it crystal clear that the position would end on December 31 if he had not covered his expenses by obtaining outside funding. The "moral equivalent of tenure" remark from 1986 cannot establish a property interest in the face of all of these clear communications and regulations. Adelson v. Regents[3] does not command otherwise because (1) the funding was continued in Adelson and only the curriculum was changed;[4] (2) there was a hearing in Adelson, yet the chancellor made his decision without reading the transcript;[5] (3) the communications in Adelson (quite different from the communications to Dr. Embury regarding renewal of funding)[6] allowed for the conclusion that the professor did have "the

[3] See Adelson v. Regents, 180 Cal.Rptr. 676 (Cal.Ct.App. 1982).

[4] See id. at 678.

[5] See id.

[6] See id. at 677 (communication "in writing" that Dr. Adelson would have the job for "whatever time you wish to be continued. . . .").

equivalent of tenure" under Perry v. Sinderman;[7] and (4) the dean in Adelson improperly told the chancellor *ex parte* that there were no funds available.[8]

We review *de novo* whether a right is "clearly established"[9] and conclude that any property interest at issue was not so clearly established that the individually named defendants should have known that they were violating Dr. Embury's constitutional right to a hearing. The defendants are thus entitled to qualified immunity.

REVERSED.

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[7] See Perry v. Sinderman, 408 U.S. 593 (1972).

[8] See Adelson, 180 Cal.Rptr. at 679.

[9] See Kwai Fun Wong v. United States, 373 F.3d 952, 966 (9th Cir. 2004).